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One Size Does Not Fit All: US Circuit Court Declines To Apply Domestic FAA Vacatur Clause to International Award

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In a recent opinion, the Eleventh Circuit Court of Appeals confirmed its prior decisions that the Federal Arbitration Act's domestic provision on vacatur does not apply to international awards. In *Earth Science Tech Inc. v. Impact UA*, No. 19-10118, 2020 WL 1861402 (11th Cir. April 14, 2020) (unpublished), the Court specifically held that an international arbitration award fell within the Panama Convention and was subject to its purview. Notably, similarities between the Panama and New York Conventions ("the Conventions") allowed for application of legal authorities decided under either Convention.[1)]

Earth Science involved a commercial dispute between a Florida-based CBD company and a Salvadoran biotechnology supplier regarding the quality of product provided pursuant to a distribution agreement. The parties' agreement provided for arbitration before JAMS International pursuant to the UNCITRAL rules with a New York seat. The arbitration demand asserted claims for breach of contract along with conversion and tortious interference with contract. The tribunal ultimately ruled in favor of the Salvadoran company which then sought to confirm the award in a Florida district court. In response, Earth Science sought vacatur on the grounds that the tort claims were not arbitrable and the damages awarded excessive. The Eleventh Circuit affirmed the district court's decision confirming the arbitral award.

The Court held that the seven exceptions to enforcement of an international award pursuant to the Conventions were the exclusive means of any challenge to an arbitral award. None of those exceptions had been invoked in Earth Science's petition to vacate the award which instead relied on 9 U.S.C. § 10(a)(4) of the FAA. That provision provides for vacatur or rehearing "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." The Court held that FAA Section 10(a)(4) was limited to challenges to domestic awards and held it inapplicable.

The Court dispensed with several challenges. First, Respondent Earth Science challenged the tribunal's jurisdiction to address tort related claims. The Court held the broad arbitration clause which invoked the UNCITRAL Rules specifically provided the tribunal with broad authority enabling it to do so.

Next, Earth Science challenged the amount of the award contending it was excessive and subject to modification pursuant to pursuant to 9 U.S.C. § 11 of the FAA. The Court again held the domestic provision inapplicable and determined it lacked the power to substantively amend or modify the

award. While the claimant put forth ample evidence supporting the claim including an expert report and substantiating evidence, Earth Science failed to introduce any report or counter-veiling evidence. As such, the claim was not only procedurally improper but also lacked merit.

The Eleventh Circuit applied a similar stance in *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GMBH*, 921 F.3d 1291, 1301-02 (11th Cir. 2019). There, the Court affirmed the dismissal of a petition to vacate an international award where respondent INPROTSA also failed to raise any New York Convention defenses. In so holding, the Court specifically rejected INTPROTSA's contention that the U.S. Supreme Court had abrogated its holding in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998) that "the defenses enumerated by the Convention provide the exclusive grounds for vacating an award subject to the Convention:"

> The Court's reasoning in refusing to vacate the award – that an asserted ground for vacatur under the FAA did not apply on the merits – does not directly conflict with *Industrial Risk's* holding that such a ground would not have warranted vacatur because the ground is not enumerated in the Convention.
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> At most, the Supreme Court's analysis indirectly suggests that the Convention does not supply the exclusive grounds for vacating an international arbitral award. (cites omitted). But that is not enough under our precedent to conclude *Industrial Risk* has been overruled.

Nonetheless, the Court held the arguments presented in support of vacatur (that the tribunal exceeded its authority pursuant to 9 U.S.C. § 10(a)(4) of the FAA) lacked merit and granted claimant's petition to confirm the award. In doing so, the Court also rejected a public policy defense premised on fraud advanced in opposition to the petition to confirm; a topic addressed broadly by Professor Margaret Moses here, and, in particular as to fraud, here. *Id.* at 1306.

In short, in these two recent decisions, the Eleventh Circuit has clearly reaffirmed its holding in *Industrial Risk* that any challenge to an international arbitration award must travel exclusively under the terms of the Conventions and not the domestic FAA provisions.

References

?1 *See also*, *Productos Roche S.A., v. IUTUM Services Corp.*, No. 20-20059-Civ-Scola, 2020 WL 1821385 at * 1 (S.D. Fla. April 10, 2020) (the New York and Panama Conventions "are substantially identical. Thus the case law interpreting provisions of the New York Convention are largely applicable to the Panama Convention and vice versa.").

This entry was posted on Friday, October 16th, 2020 at 7:12 am and is filed under Enforcement, USA, vacatur
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